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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 561

JAMES M. BUSHNELL
*Petitioner,*

v.

O. B. ELLIS, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
*Respondent.*

*On Writ of Certiorari to the Court of Criminal Appeals of Texas*

## BRIEF FOR THE RESPONDENT

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*On Writ of Certiorari to the Court of Criminal Appeals of Texas*

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## BRIEF FOR THE RESPONDENT

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## OPINION BELOW

The Court of Criminal Appeals of Texas denied Petitioner's application for writ of habeas corpus and motion for rehearing without written order or opinion (R. 44-47).

## JURISDICTION

Petitioner's application for writ of habeas corpus was denied by the Court of Criminal Appeals of Texas on January 15, 1960 (R. 44). Motion for rehearing was dismissed by the Court on February 16, 1960 (R. 47). Petition for writ of certiorari was filed on February 25, 1960, and on December 5, 1960, the Petitioner was granted leave to proceed *in forma pauperis*. Jurisdiction of this Court rests on 28 United States Code 1257(3).

## QUESTIONS PRESENTED

I.

HAS PETITIONER EXHAUSTED HIS STATE REMEDIES WHEN HE RAISES QUESTIONS OF STATE PROCEDURE ALLEGING A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SUCH QUESTIONS HAVE NOT BEEN RAISED ON APPEAL OR HABEAS CORPUS IN THE TEXAS COURT OF CRIMINAL APPEALS.

II.

DOES THIS PETITION, ON THE FACTS, HELP SUBVERT THE TRADITIONAL AND PROPER FUNCTION OF THE WRIT OF HABEAS CORPUS.

III.

DID THE TEXAS COURT OF CRIMINAL APPEALS RULE CORRECTLY IN DENYING HABEAS CORPUS AND IN FINDING THAT PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REASON OF PETITIONER REPRESENTING HIMSELF, WHEN CHARGED IN A STATE COURT WITH A NON CAPITAL FELONY OFFENSE, INFORMED THE COURT THAT HE HAD NO ATTORNEY, FAILED TO REQUEST THE APPOINTMENT OF COUNSEL TO REPRESENT HIM, AND MADE NO MOTION FOR A CONTINUANCE FOR ANY REASON.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1, reads in part as follows:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Article 491, Vernon's Code of Criminal Procedure of Texas, provides:

> "There shall be no arraignment of a defendant except upon an indictment for a capital offense."

Article 494, Vernon's Code of Criminal Procedure of Texas, provided in 1944:

> "When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him. The counsel so appointed shall have at least one day to prepare for trial."

Article 1408, Title XVII, Vernon's Penal Code of Texas provides:

> "Art. 1408. Robbery
>
> "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death or by confinement in the penitentiary for any term not less than five years."

## STATEMENT

Respondent does not think it necessary to set out in voluminous detail a repeatment of the statement contained in Petitioner's brief, but will confine his statement to a brief resume of the pertinent facts.

This is a criminal case in which the Petitioner was charged by indictment with the felony offense of rob-

bery by assult. Under Article 1408, Vernon's Penal Code of Texas, the punishment prescribed for this crime is confinement in the State penitentiary for life, or for a term of not less than five (5) years. This case, therefore, involves a non capital felony offense under Texas law. The case was tried before a jury in the District Court of Orange County, Texas, in June, 1944, resulting in Petitioner's conviction. Petitioner was sentenced to the State penitentiary for a term of thirty-five (35) years. During the course of the trial Petitioner represented himself, and the record is silent as to whether or not Petitioner ever made a request for a court appointed attorney. Petitioner was twenty-five (25) years of age at the time of the trial and had some six (6) years of formal education. The State's evidence consisted of a voluntary confession executed by Petitioner and the testimony of six (6) people, including four (4) local law enforcement officers.

Petitioner, after conviction and sentencing, did not perfect an appeal to the Court of Criminal Appeals of Texas. It was not until sixteen (16) years after his conviction that Petitioner attempted to raise the question of "denial of due process" by the State court for failing to appoint an attorney to represent him. Petitioner then collaterally attacked the judgment of the Orange County District Court by filing a petition for writ of habeas corpus in the Court of Criminal Appeals of Texas, which was subsequently denied along with a motion for rehearing. After Petitioner's application for a writ of habeas corpus was denied by the Court of Criminal Appeals, Petitioner then filed an application for writ of certiorari to the

Supreme Court of the United States, which was granted with leave to proceed *in forma pauperis*.

## ARGUMENT

### I.

### PETITIONER HAS NOT EXHAUSTED HIS STATE REMEDIES WHEN HE RAISES QUESTIONS OF STATE PROCEDURE ALLEGING A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SUCH QUESTIONS HAVE NOT BEEN RAISED ON APPEAL OR ON HABEAS CORPUS IN THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner has raised numerous questions of State procedural law in the Supreme Court of the United States which were not presented to the Court of Criminal Appeals of Texas in his application for writ of habeas corpus. Respondent contends that this honorable Court does not have jurisdiction to consider, and that Petitioner should be precluded from asserting questions that were not presented to the Texas Court of Criminal Appeals in the habeas corpus proceeding in January, 1960. Petitioner now attempts to raise new issues and to contend that his alleged arrest without a warrant, failure to speedily take him before a Magistrate, his being forced from Louisiana into Texas without his consent or without an extradition hearing, and the alleged coerced confession, were all a part of the pattern whereby

he was denied due process of law under the Fourteenth Amendment to the United States Constitution. Petitioner not only chose not to raise these points on habeas corpus in the State courts, but he did not even raise these questions in his application for writ of certiorari to this Court in February, 1960. He did mention on motion for rehearing in the Texas Court of Criminal Appeals that his confession was extorted, but this was dropped from the petition for writ of certiorari in this Court. Apparently, he did not think that these questions were meritorious or he would have asserted them earlier along with his allegations regarding counsel. The one and only question presented in this Court was the failure of the trial court to appoint counsel to represent Petitioner. Certiorari was granted by this Court on that one point and on no other.

It is Respondent's contention that Petitioner has not exhausted his State remedies as to these additional allegations. To have done so he must have raised them in the Texas Court of Criminal Appeals in his application for writ of habeas corpus. The Texas Court of Criminal Appeals had before it only a generalized assertion that Petitioner was tried without counsel and therefore denied due process of law. The State Court cannot fully evaluate the petition unless Petitioner is compelled to set out generally, in lay language, the particular way in which he feels the lack of counsel handicapped his defense. The Petitioner gave no hint to the State Court of any specific way in which he felt damaged by the lack of counsel.

Although Respondent views these grounds, as finally asserted, to be lacking in merit, we nonetheless hold to the view that the State courts should have had the opportunity to pass on questions of this nature to determine whether or not there had been denial of due process. In *Brown v. Allen*, 344 U.S. 443 (1953), the Supreme Court, at page 478, stated:

> "We have interpreted Section 2254 [United States Code, Annotated] as not requiring repetitious applications to state courts for collateral relief, page 447, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. *A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies.*" (Emphasis added)

The Court went on to say:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized where a state prisoner is in custody in violation of the Constitution of the United States. 28 U. S. C., Section 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal." [The Court citing Sunal v. Large, 332 U.S. 174, 180; Eagles v. Samuels, 329, U. S. 304, 311; In Re Yamashita, 327 U. S. 1, 8; Johnson v. Zerbst, 304 U. S. 458, 465; Goto v. Lane, 265 U. S. 393.] "To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."

It is apparent from this language that the Supreme Court has adopted the view that Federal courts should not review questions raised in an application for writ of habeas corpus when such questions have not previously been raised by habeas corpus in the State courts. The Supreme Court requires that the State courts be given opportunity to pass on all such questions of denial of due process of law in the trial of one under the State law before such questions are reviewed by the Federal court. In the case at bar, Petitioner, in his application for writ of habeas corpus to the Court of Criminal Appeals, raised the sole question of denial of due process by failure of the court to appoint an attorney to represent him. Since all of these new points raised by Petitioner in his brief are aspects of State procedural law, and since Petitioner did not feel inclined to appeal his case after his conviction, nor were such points raised by habeas corpus in the State courts, all such points of error were *waived* at that time and certainly could not now be collaterally attacked by writ of habeas corpus to a Federal district court or on certiorari in this Court. It is well established that when a State provides a method for review of criminal cases and such review affords the opportunity for a high court to determine whether the accused was given a fair and just trial, if the accused chooses not to exhaust the State remedies afforded him, no subsequent complaint lies. A State procedural rule which forbids the raising of Federal questions at late stages in the case, or by any other than a prescribed method has been recognized as a valid exercise of State power. Wil-

*liams v. Georgia*, 349 U. S. 375, 382-383 (1955), and cases cited at N. 6, *Parker v. Illinois*, 333 U. S. 571 (1948). *Central Union Telephone Co. v. City of Edwardsville*, 269 U. S. 190 (1925).

Certainly, this Court is not precluded from considering points when the State court allows the Federal questions to be raised only at a late stage in the State proceeding as "an avoidance of the Federal issue." *Rogers v. Alabama*, 192 U.S. 226 (1904); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939). Here, however, Petitioner was never precluded from raising the issues which he now attempts to raise in his brief on the merits. There has been no "avoidance of the Federal questions" by the State courts. Consequently, this Court should refrain from a consideration of these additional questions and adhere to the principle, which it has recognized, that Texas can validly require these issues to be raised on appeal or habeas corpus and not for the first time on motion for rehearing in the State habeas corpus proceeding. This Court has repeatedly held that a claim not asserted in a State court will not be considered on certiorari to the Supreme Court since under those circumstances there would not be a complete utilization of the processes made available to him by the convicting State. *Brown v. Allen*, *supra*. The failure to raise these questions in the State courts or in the petition here works an estoppel and the present afterthought should not revive the question. *Pagel v. MacLean*, 283 U.S. 266 (1931). This Court recently applied this rule in *Michel v. State of Louisiana*, 350 U. S. 91 (1955). It was there held that where the defendant in a State court prosecution did not raise

certain contentions in the lower courts, the Supreme Court on certiorari could not consider the question. Respondent contends that Petitioner, being a mature man of average intelligence, had "a reasonable opportunity" to have these new issues as to his claimed denials heard and determined by the State courts. *Parker v. Illinois, supra; Paterno v. Lyons*, 334 U.S. 314 (1948).

## II.

## THIS PETITION, ON THE FACTS, HELPS SUBVERT THE TRADITIONAL AND PROPER FUNCTION OF THE WRIT OF HABEAS CORPUS.

If Petitioner's theory of allowing the Supreme Court to review every imaginable idea concocted by convicts located throughout the United States, without requiring them to perfect their appeals to the higher State courts, was pursued to its logical conclusion, our complete judicial system would break down. The writs of habeas corpus and attendant certiorari are simply not the remedies on which an accused is entitled to a complete and full review of his case. Habeas corpus (and thus certiorari in these cases), had its ancestrial beginning during the Roman Empire. Church, *Habeas Corpus*, 2d ed. 1893, 2-3. The Great Writ serves only one purpose, and that is to afford the accused an opportunity to present allegations to a court which show an illegal confinement. The writ of habeas corpus has been well described as "the best and only sufficient defense of personal freedom." *Ex Parte Yerger*, 8

Wall 85, 95. It has also been called by Hallam "the principal bulwark of English liberty." The writ never was and never should be used as a Federal appeal statute whereby the effectiveness of the state criminal courts can be destroyed.

The passage of sixteen (16) years makes it difficult, if not impossible, to reconstruct the precise facts surrounding the conviction. The assertion by Petitioner that he was denied a fair and just trial in 1944 did not arise until all of the witnesses and officers of the court were deceased save two. Now Petitioner alleges an irregularity in that proceeding of long ago. The trial judge is dead and the then district attorney, now United States District Judge Joe Fisher, has no independent recollection of the precise facts of this case. Neither does Mr. Sexton, the then County Attorney, recall the incidents surrounding the trial. It is common in habeas corpus and certiorari cases for affidavits of the trial judge, the arresting officers, and other witnesses to be obtained as exhibits to accompany the application or response. In this way, the allegations or refutations are supported. Frequently, a petitioner will attempt to substantiate the assertions made in his petition by his own self-serving affidavit or that of a close relative. The State is, therefore, required to seek out, in the county of conviction, the participants in the trial to obtain their contradicting affidavits. By reason of the volume of criminal cases, this is often difficult and after a passage of a long period of time, practically impossible. Usually, as here, death and fading memory take

their toll. In *Betts v. Brady*, 316 U.S. 455 (1942), the test for determining denial of due process on the basis of lack of counsel was firmly established by this Court in 1942. In spite of the fact that the rule of *Betts v. Brady, supra*, existed at the time of Petitioner's conviction, and numerous other cases have since been decided on this point, Petitioner waited many years to initiate this proceeding.

In effect, the affidavit procedure requires that the basic facts of the case be re-examined and the State is put to a re-trial in the Federal courts without benefit of witnesses or jury. With no witnesses on the scene who can remember the exact circumstances surrounding the trial to refute his contentions, Petitioner conveniently chose to attempt to reopen the facts relating to his arrest and conviction. Petitioner's self-serving assertions are so tardily alleged that they should be disregarded.

Respondent suggests that the one question properly before this Court was considered and found to be without merit in 1960 on habeas corpus by the Texas Court of Criminal Appeals, the highest Texas Court having criminal jurisdiction.

The policy questions involved here are, Respondent believes, of great importance. Should a convicted felon, who failed to appeal his conviction and attempted no legal process for sixteen (16) years, be allowed to re-open a case with allegations of denial of due process involving questions of fact, at a time far distant from the date of his conviction, almost at his own pleasure?

Respondent urges this honorable Court to consider the effect which its reversal and remand of this case may have on our system of criminal jurisprudence.

In the first instance, such a decision could, in fact, swing open prison gates throughout the country. It could allow the release of countless convicted felons who find in this precedent a vehicle for substantiating a groundless charge of denial of due process. Such an assertion, without merit as it may be, can become dignified and gain credibility, because the passage of time has rendered the State helpless to discredit it adequately.

Respondent again insists that the one and only question now properly before this Court is whether Petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution by virtue of his being tried without counsel.

Respondent contends that examination of the record reflects that the trial judge conducted the trial in a fair and just manner and that under the rules of *Brown v. Allen*, *supra*, *Betts v. Brady*, *supra*; and *Cash v. Culver*, 358 U.S. 633 (1959), the trial was fundamentally fair and just, that it did not reflect a vital flaw in the conduct of the case in the State courts, and that Petitioner was accorded all aspects of due process of law under the Fourteenth Amendment to the United States Constitution.

This case is another in an avalanche of habeas corpus proceedings which the State of Texas has been required to defend during the past four (4) years. This swelling flood of such cases has engulfed the office of the Texas Attorney General with endless litigation in the Federal courts in the habeas corpus field. Since January, 1957, there have been approximately three hundred seventy-five (375) habeas corpus and certiorari petitions from imprisoned Texas felons filed in the United States District Courts and in this Court. This has constituted a substantial and rapidly increasing part of our case load. Almost without exception these petitions have alleged a denial of due process of law under the Fourteenth Amendment on the grounds that the Petitioner was not represented by counsel at all, that he was inadequately represented, that improper evidence was admitted, or that a confession was extorted and coerced. The prison lawyers invariably cling to the identical assertions and rarely vary the form or content of their allegations from one case to the next.

For the most part, these contentions represent an attempt to re-open the facts in a case which has been decided by a judge and jury in a Texas State Court where the conviction has been upheld on appeal. In almost every case, habeas corpus on the same contentions has been denied by the Texas Court of Criminal Appeals.

Frequently, the case remains in the Federal courts several years. Under the normal procedure, after our

Texas appellate court denies habeas corpus, an application is made for certiorari to this Court. In most instances that application is denied. Having then exhausted the State remedies, the next step for the prisoner is an application for writ of habeas corpus, alleging the same grounds as before, to a United States district court. If this is denied, as we find is done in about ninety-eight percent (98%) of the cases, an appeal from that denial is taken to the United States Court of Appeals. After that Court sustains the district court's holding, the prisoner then sometimes attempts to reach this Court again by certiorari based upon the denial of habeas corpus in the lower Federal courts. All of this may take three or four years. We have observed that after this arduous series of proceedings, an unsuccessful petitioner then may attempt to start the complete process over by a completely new petition alleging slightly different grounds with new assertions of denial of due process. It is quite difficult in any of these cases to ever consider a judgment of conviction *final* as a matter of law.

As this Court so cogently pointed out in *Brown v. Allen*, *supra*, there must be some finality to judgments of conviction. Is this never-ending process which has evolved in the habeas corpus field obscuring and submerging the legitimate purpose of the traditional writ? We believe that it is. This taxing of habeas corpus and certiorari jurisdiction of the Federal courts has made it increasingly difficult for either the Courts or the State which is called up to defend to keep "adjudication of such

matters in managable proportions." As Mr. Justice Frankfurter observed in his opinion in *Brown v. Allen, supra:*

> "Experience may be summoned to support the belief that most claims in these attempts to obtain review of State conviction are without merit. Presumably they are adequately dealt with in the State courts . . . I am aware that misuse of legal procedures, whereby the administration of criminal justice is too often rendered leaden-footed, is one of the disturbing features about American criminal justice."

Respondent agrees with Mr. Justice Frankfurter that "the meritorious claims are few."

To be sure, we recognize the importance of the writ, but this very recognition impels us to help maintain its purity and valid application. We concur with Mr. Justice Frankfurter that:

> ". . . its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments . . . Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *Brown v. Allen, supra.* (Opinion of Mr. Justice Frankfurter inviting the attention of a Federal court when confronted with a petition for writ of habeas corpus), p. 512.

Respondent views this case as another abuse of the writ, which, when taken with the great mass of other such cases, will ultimately result in eroding and stagnating the orderly administration of justice.

Respondent is in total accord with the views of the late Mr. Justice Jackson, as expressed in 1953. In a concuring opinion in *Brown v. Allen*, *supra*, at page 536, he commented on the alarming conditions of a growing tendency to litigate ill-founded habeas corpus claims in these words:

> "The fact that the substantive law of due process is and probably must remain so vague and unsettled as to invite far fetched or borderline petitions, makes it important to adhere to procedures which enable Courts readily to distinguish a probable constitutional grievance from a convict's mere gamble on persuading some indulgent judge to let him out of jail. Instead, this Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious applications to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search . . . In this multiplicity of worthless cases, states are compelled to default or to defend the integrity of their judges and their official records, sometimes concerning trials or pleas that were closed many years ago. State Attorneys General recently have come habitually to ignore these

proceedings, responding only when specially requested and sometimes not then. Some State courts have wearied of our repeated demands upon them and have declined to further elucidate grounds for their decisions. The assembled Chief Justices of the highest courts of the States have taken the unusual step of condemning the present practice by resolution. [Conference of Chief Justices—1952, 25 State Government, No. 11, p. 249] . . . Once upon a time the writ could not be substantiated for appeal or other reviewing process but challenged only the legal competence or jurisdiction of the committing court. Conflict with State courts is the inevitable result of giving the convict a virtual new trial before a Federal court sitting without a jury. It is sometimes said that *res judicata* has no application whatever in habeas corpus cases and surely it does not apply with all its conventional severity. Habeas corpus differs from the ordinary judgment in that, although an adjudication has become final, the application is renewable, at least if new evidence and material is discovered or if, perhaps as the result of a new decision, a new law becomes applicable to the case. This is quite proper so long as its issues relate to jurisdiction. But call it *res judicata* or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. Nor is there any good reason why an identical contention rejected by a higher court should be reviewed on the same facts in a lower one."

It has also been our experience in dealing with these cases that it is the increasing tendency for convicts to litigate over and over essentially the

same contentions by filing new petitions with the alleged points of error differently stated. By making it appear that they are raising new allegations, the ordinary petitioner can spend years prosecuting his applications from one court to the next. The end result of this practice is a maze of interminable litigation which clogs both State and Federal courts and the offices of the State Attorneys General. We think it necessary to the protection of the cherished Writ of Habeas Corpus that our methods and practices be re-examined and altered to weed out the hoard of frivolous applications. In so doing, the just claims can more speedily and effectively receive the corrective attention which they deserve.

## III.

THE TEXAS COURT OF CRIMINAL APPEALS RULED CORRECTLY IN DENYING HABEAS CORPUS AND IN FINDING THAT PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REASON OF REPRESENTING HIMSELF WHEN CHARGED IN A STATE COURT WITH A NON CAPITAL FELONY OFFENSE, INFORMED THE COURT THAT HE HAD NO ATTORNEY, FAILED TO REQUEST THE APPOINTMENT OF COUNSEL TO REPRESENT HIM, AND MADE NO MOTION FOR A CONTINUANCE FOR ANY REASON.

The Texas criminal procedural rules have never required that counsel be appointed to represent one charged with a criminal offense excepting cases in which one is arraigned on an indictment for a capital offense. See Articles 491 and 494, Vernon's Texas Code of Criminal Procedure. *Hill v. State* 310 S.W.2d 588, (1958), held that since felony theft is not a capital offense, Article 494 does not apply. It is implicit in these Texas statutes that one under indictment for a non capital felony offense is allowed to represent himself at his trial. In such instances, it is not incumbant on the trial judge to appoint counsel, whether or not it is requested, unless the absence of counsel will be so detrimental to the defendant as to result in a trial which is not fundamentally fair and just. *Betts v. Brady, supra.* Article 494, as amended in 1959, has not been construed by a Texas court. It is not yet settled whether this statute, as amended, requires appointment of counsel in all felony cases, or leaves the law unchanged. In any event, this 1959 amendment to the Texas law is not a material consideration here. The state of the Texas law under Article 494, as it existed in 1944, must be controlling because Petitioner was convicted in 1944. This was fifteen (15) years before the State law was amended. No *ex post facto* application can be given to the amended statute. Whatever its meaning, it cannot relate back to the time of Petitioner's trial.

The ultimate consideration here is the fundamental fairness of Petitioner's trial. We think the record plainly resolves this question in favor of Respondent.

It has been held that where a defendent is tried in a State court for violation of State law, the procedure prescribed by the State Legislature for trial of criminal cases, and not the procedure prescribed in the Sixth Amendment to the United States Constitution, must be followed. *Holton v. State*, 143 Tex. Cr. R. 415, 158 S.W.2d 722; reh. den. 143 Tex. Cr. R. 419, 158 S.W.2d 775; cert. den. 316 U.S. 703 (1942).

It was held in *Holton v. State*, *supra*, that:

> "... the court is not required to appoint an attorney unless the accused is being arraigned and is too poor to employ counsel. Therefore, in view of Article 491, supra, this court has heretofore held that the trial court is only required to appoint an attorney when the accused is charged with a capital offense since there is no arraignment of one charged with crime except in capital cases." (Citing authorities)

This case was reviewed by the United States Supreme Court and writ of certiorari was denied in 316 U.S. 703 (1942).

In *Ex Parte Hope*, 154 Tex. Cr. R. 456, 228 S.W. 2d 171, it was stated:

> "An arraignment is had in Texas only upon one being tried for a capital offense. Art. 491, C.C.P. Only those tried for such capital offenses are entitled under our laws to the services of court-appointed counsel. Art. 494, C.C.P. Upon a dismissal of the capital portion of this offense, under our statute, the trial court was

under no duty to appoint counsel." (Citing authorities)

It has been settled by this Court that each State has the right and authority to prescribe the rules and procedures by which it wishes her criminal courts to try and hear her criminal cases, and these State rules will not be set aside unless a defendent has been deprived of due process which is guaranteed to him under the Fourteenth Amendment of the Constitution of the United States. *Galleyos v. Nebraska*, 342 U.S. 55 (1951), *Wolf v. Colorado*, 338 U.S. 25 (1949), *Adamson v. California*, 332 U.S. 46 (1947). It has long been the law in Texas that appointment of counsel is required only in capital felony offenses. *Lopez v. State*, 46 Tex. Cr. R. 473; 80 S.W. 1016; *Faggett v. State*, 122 Tex. Cr. R. 399, 55 S.W. 2d 842; *Thomas v. State*, 132 Tex. Cr. R. 549, 106 S.W. 2d 289. This State procedural law was discussed and considered by this Court in *Betts v. Brady, supra.*

This honorable Court has written much, and a number of cases have been adjudicated on this point. It is clear that the rule which was recently enunciated in *Cash v. Culver, supra*, governs in cases of this nature. It was there held that:

> "Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be

> fundamentally unfair, the Constitution requires that the accused must have legal assistance at his trial *Uveger v. Pennsylvania*, 335 U.S. 437, 441.

We think that the fairness of any trial depends, in the main, on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial.

Each case must, therefore, be looked to individually to ascertain the facts in order to decide whether one was deprived of due process of law in that instance. In reviewing this determination by the trial court, it must be remembered that the trial judge, observing the petitioner's conduct, apparent normal intelligence, alertness, awareness of the issues, and general demeanor at the time of trial, possessed the best information available as to the fairness and adequacy of the trial. His action should be given much weight and his judgment should be accorded great consideration in view of his knowledge of all the circumstances of the trial. His honest discretion is of high importance and must be respected unless patently erroneous. We suggest that here the trial judge's determination was sound. This latitude of judgment on the part of the trial court is discussed in *Betts v. Brady, supra:*

> "... we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deem proper, to appoint counsel when that course seems to be required in the interest of fairness."

This Court also there expressed the view that:

> "The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness. We cannot say that the Amendment embodies an inexorable command that no trial for any offense, or any Court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

It is now the well defined rule that the Constitution of the United States does not guarantee to a defendant charged in a State Court with a non capital offense an attorney except in a case where the gravity of the crime and other factors i.e., the age and education of defendant, the conduct of the court or the prosecuting officials, the complicated nature of the offense charged and the possible defense thereto, render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair. *Betts v. Brady, supra; Uveger v. Pennsylvania, supra.*

Respondent believes that Petitioner has failed to establish that a vital flaw existed in the conduct of his trial in the State court, that such trial was unfair and that his constitutional rights were not protected. In that connection, Respondent calls the Court's attention to the following circumstances surrounding the trial:

At the time of trial Petitioner was a mature, twenty-five (25) year old man, had received six (6) years of formal education, could read and write, and spoke

in a coherent manner, and every indication is that he had at least average intelligence. *Foster v. Illinois*, 332 U.S. 145 (1947). We do not contend that any layman could defend himself as well as could a reasonably competent lawyer, and we do not contend that he was as well represented by himself as he would have been had he had a lawyer. We readily admit that under the adversary system it is more likely that justice will result if a defendant is represented by a lawyer of his own choosing, and this not being available, a court appointed attorney is far preferable to no attorney at all. However, the law is that a man does have a right to defend himself, and this defendant did defend himself. The precise law question is whether or not his defense of himself resulted in an adequate development of the facts and a fair trial. The passage of sixteen (16) years has deprived the State of the witnesses who could throw the most light on this question. We contend that there is nothing apparent on the face of the record to indicate that he received anything but a fair trial, and that if, under the circumstances, the Court goes beyond the record in the case and takes the ex parte and self-serving statements of the convicted Petitioner himself at full face value when they cannot be refuted, it makes formal processes of justice as quicksand. It is absolutely necessary that the processes of government have some firmness and stability. The law on this subject began developing in the 1942 case of *Betts v. Brady, supra*, which was two (2) years prior to Petitioner's conviction. At the time of his conviction the rule of law on this point was thus firmly established. Under

these circumstances, the State contends that this Court should look primarily to the impartial evidence available on the central question of this case and not raise presumptions that public officials did not do their duties when there is no reliable evidence to impeach the judgment of the district court, or the official conduct of the district attorney, or the judgment of the Court of Criminal Appeals on habeas corpus. There should be a strong presumption that District Attorney Joe Fisher did not overreach this defendant, but that under the law and his duty accorded him all and every consideration that our law gives to an individual charged with a crime, and that the district judge in these circumstances bent over backwards to see that an innocent man was not convicted. Why should State officials desire to convict an innocent man? That is so contrary to the good conscience of public officials that no presumptions, implied or otherwise, should be indulged in to question their integrity or their performance of duty. This Court pointed up the desirability of resolving all doubts in favor of public officials in *Bute v. Illinois*, 333 U.S. 640, 672 (1948):

> "Doubts should be resolved in favor of the integrity, competence, and proper performance of their official duties by the Judge and the State's Attorney. They were State officials lawfully chosen to discharge serious public responsibilities under their oaths of office. Especially in a self-governing State and Nation, governmental stability depends upon the giving of full faith and credit in form, substance and spirit to public acts, records and judicial proceedings not

only among the States, but among individuals and between their State and Federal Governments."

The charges against Petitioner were stated in simple terms, not ordinarily capable of being misunderstood by a grown man, however elementary or primitive his understanding. (R. 1-indictment).

As this Court went on to say in *Bute v. Illinois*, *supra:*

> "It is suggested that an error of omission appears in the failure of the records to show either the presence of counsel for the accused, or an inquiry by the court as to counsel for the accused, or the appointment of counsel by the court to assist the accused. Here also, *if any presumption is to be indulged, it should be one of regularity rather than that of irregularity. . . . Doubts should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and the State's attorney.*

Petitioner's direct and cross-examination of witnesses and his own testimony clearly shows a grasp of the facts of the case. In short, Petitioner's conduct of his defense indicates a normal alertness sufficient to show that he was not unduly handicapped by the lack of counsel. While the trial court restrained Petitioner from injecting his own testimony into his examination and cross-examination of other witnesses, he was given full and uninterrupted opportunity to testify in his own defense.

When Petitioner took the witness stand to testify, he automatically opened the door to cross-examination by Mr. Fisher as to his previous conviction record. The inquiry as to his prior imprisonment was directed to Petitioner for purposes of impeaching his credibility and was so limited. His own reference to serving a sentence in a Louisiana prison was admitted as a part of his voluntary confession and since the court found the confession, itself, was admissable, this statement, as contained therein, was likewise properly admitted. Article 732a, Vernon's Texas Code of Criminal Procedure; *Neill v. State*, 158 Tex. Cr. R. 551, 258 S.W.2d 328.

Directing our attention to the remaining grounds now asserted, Respondent maintains that, as discussed under Question I, the Court should not reach these assertions. If, however, the Court considers these new allegations on their merits, Respondent believes that it will find them to be without merit.

A. The voluntary confession, while repudiated by Petitioner, was not shown to the satisfaction of the Court, to be coerced. Constable Williamson testified in response to a question by Petitioner that he did not jerk him out of a car and beat him up in Louisiana (R. 12, 13). He stated that he did not touch Petitioner when he was apprehended in Louisiana. Petitioner was aware of the import of his confession. He stated therein that "I realize that by making this voluntary statement that the same can be used against me or my trial" (R. 17). In later testimony, Constable Williamson was asked by Mr. Fisher if he or Officer Thompson "put these scars

on his [Petitioner's] body." He replied, "No sir." When asked if he hit him or beat him in any way to make those scars, he answered, "No" (R. 31). The record does not contain any evidence suggesting that any officers at any time beat or threatened to beat Petitioner to cause him to sign the confession which he himself described as being a "*voluntary statement* in writing to the said W. P. Sexton" (R. 16). He understood that "I do not have to make any statement at all . . ." (R. 16).

Can there be any doubt that the trial judge, in admitting the confession, considered that Petitioner's testimony, in repudiating it on the witness stand, was controverted by responsible law enforcement officers of Orange County, Texas?

B. It is clear from the arresting officers testimony that he apprehended Petitioner in Louisiana after chasing him in "hot pursuit" across the State line (R. 12, 13). Constable Williamson, when asked by Mr. Fisher if he [Petitioner] was hard to catch, testified that "he gave us a good race . . ." (R. 31). Petitioner stated that "I returned from Louisiana voluntarily with Mr. Hop Williamson." There is nothing in the record to support Petitioner's assertion in his brief at page 27 that "if Petitioner in fact agreed to return with the Texas officers as the officer claimed, and thereby waived his rights to an immediate hearing in Louisiana and to extradition, Petitioner did so after being beaten." It was Petitioner who said that he returned from Louisiana voluntarily (R. 16).

C. Petitioner asserts that he was subjected to interrogation which improperly raised the issue of his character and reputation. The questions to which he refers on page 32 of his brief related to whether he could produce any witnesses to the alleged threats resulting in the confession. Petitioner stated that he had a witness to threats against him by Mr. Thompson (R. 24). All of Mr. Fisher's subsequent questions, which Petitioner now contends were improper, inquired about why Petitioner had not produced any witness that he might have. Mr. Fisher asked: "Can't you tell the Sheriff to serve subpoenas on the witnesses?" (R. 25). "You don't have anybody interested enough to come over here and look after you?" (R. 28). "You could write some letters?" (R. 28). Each question was directed to Petitioner only after he had contended that he could produce a witness. Mr. Fisher was simply attempting to determine whether Petitioner, in fact, had any witnesses at all, and, if so, where they were. Certainly, these questions were not intended to, and did not bear up Petitioner's character and reputation in any way.

Respondent recalls the language of this honorable Court in *Betts v. Brady*, *supra*, at page 471:

> ". . . in the great majority of the states it has been the considered judgment of the people, their representatives, and their courts that an appointment of counsel in criminal cases is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy."

Respondent believes that in allowing Petitioner to represent himself, the trial judge was cognizant of, and gave consideration to, the criteria which has been systematically established by this Court to ascertain the fairness and justice of a trial. After

studying the record we are convinced that the age, ordinary intelligence, lack of request for counsel, awareness of the nature and import of the charge, and the simplicity of the indictment and the defenses thereto all weighed heavily in the Court's decision to allow Petitioner to represent himself. We view the judge's conduct of the trial and the district attorney's presentation as fundamentally fair and just in every aspect.

## CONCLUSION

The Court of Criminal Appeals of Texas correctly denied Petitioner's application for writ of habeas corpus. On the facts presented, Petitioner has not established that he was deprived of due process of law under the Fourteenth Amendment to the United States Constitution at the time of his trial. Respondent contends that Petitioner's trial was fundamentally fair and just, and that he was accorded all aspects of due process under the State and Federal laws. For these reasons, Respondent believes that this Court should affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

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No. 561

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

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JAMES M. BUSHNELL,
*Petitioner*

vs.

O. B. ELLIS, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
*Respondent*

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## Certificate of Service

I, B. H. Timmins, Jr., Assistant Attorney General of Texas, do now enter my appearance in the Supreme Court of the United States in the above captioned cause in behalf of Respondent; I do further certify, as Attorney for Respondent, that two (2) copies of the foregoing brief have been forwarded by United States air mail, first class, postage prepaid, to Mr. Percy D. Williams, 3100 Gulf Building, Houston 2, Texas, counsel for Petitioner, on this —— day of April, 1961. The above service is made in compliance with Rule 33 of the Supreme Court Rules.

B. H. TIMMINS, JR.
Assistant Attorney General
of Texas
Capitol Station
Austin, Texas

# SUPREME COURT OF THE UNITED STATES

No. 561.—October Term, 1960.

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| James M. Bushnell, Petitioner, v. O. B. Ellis, Director, Texas Department of Corrections. | On Writ of Certiorari to the Court of Criminal Appeals of Texas. |

[May 22, 1961.]

Per Curiam.

The judgment of the Court of Criminal Appeals of Texas is reversed and the cause is remanded to that court with directions to grant petitioner a hearing upon his petition for a writ of habeas corpus. *Uveges* v. *Pennsylvania*, 335 U. S. 437; *Cash* v. *Culver*, 358 U. S. 633; *McNeal* v. *Culver*, 365 U. S. 109.

Mr. Justice Stewart took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

No. 561.—October Term, 1960.

James M. Bushnell, Petitioner, v. O. B. Ellis, Director, Texas Department of Corrections. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[May 22, 1961.]

Mr. Justice Clark, with whom Mr. Justice Frankfurter and Mr. Justice Harlan join, dissenting.

This application for the issuance of a writ of habeas corpus was filed as an original action in the Court of Criminal Appeals of Texas. Neither the record, the briefs, nor argument of counsel indicate that such an action has ever been filed in a District Court of Texas as appears to be required by Texas procedure. See *Ex parte Rodriguez*, — Tex. Cr. R. —, 334 S. W. 2d 294 (1960); *Ex parte Fitzpatrick*, 167 Tex. Cr. R. 376, 320 S. W. 2d 683 (1959); *Ex parte Brooks*, 85 Tex. Cr. R. 397, 212 S. W. 956 (1919). The judgment of the Court of Criminal Appeals might, therefore, have been based upon an independent state ground. In this condition of the record, I would affirm the judgment without prejudice to the petitioner filing in any appropriate Texas District Court an application for a writ of habeas corpus to test out the validity of his detention. See Vernon's Tex. Code Crim. Proc., Art. 119.